

Executive	1-100
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MEMORANDUM FOR: Executive Director-Comptroller

SUBJECT : Procedures Proposed by Civil Service Commission
in Involuntary Disability Retirement Cases

REFERENCE : Letter for ExDir-Comp fr ExDir, CSC, dtd 29 Dec 67

1. This memorandum suggests action on the part of the Executive Director; this action is contained in paragraph 4.

2. The Executive Director, Civil Service Commission has sent you for comment an advance copy of new procedures to be followed in cases of disability retirement initiated by an agency, i.e., involuntary disability retirement. The new procedures create an entirely new method for handling these cases and establish specific requirements both on employing agencies and on the Commission.

3. Although CIA has only infrequently used the involuntary disability retirement approach, we foresee great difficulty in complying with the new procedures in future cases when the individual, his position in the Agency, and the reasons for our initiating the involuntary action involve classified information. Perhaps the Civil Service Commission can include in its proposed procedures or at least on an informal basis some provision or exception that would protect our security interests, but rather than make such a suggestion in your response to the referent letter we propose to explore this possibility in our follow-up conversations with the Executive Director.

4. It is suggested that you sign the attached letter to the Executive Director, Civil Service Commission.

/s/ Emmett D. Echols

Emmett D. Echols
Director of Personnel

Att

Distribution:

0 - Addressee

1 - ER

2 - DDS

1 - D/Pers, 1 - C/ESD

OP/ESD/1 [redacted] as (3 January 1968)

ER 68-3/a
DD/S 68-0023

9 JAN 1968

Mr. Nicholas J. Oganovic, Executive Director
United States Civil Service Commission
Washington, D. C. 20415

Dear Nick:

We have studied carefully the advance copy of the Federal Personnel Manual letter on new procedures for the filing of involuntary disability retirement cases which you sent with your letter of 29 December 1967.

We have no objection to the new procedures provided we can be assured that any classified information which may be associated with involuntary disability retirement cases will be protected fully by appropriate safeguards. Such sensitive information may include the description of an employee's duties, the basis for submitting an involuntary disability retirement application, or the identification of other Agency employees connected with an individual's application.

In order to ensure that we may satisfy the new procedures, while at the same time protecting certain kinds of information required thereby, I have asked Mr. Emmett D. Echols, our Director of Personnel, to discuss this matter in greater detail with you.

We very much appreciate your consideration in sending this advance copy and your thoughtfulness in keeping our interests in mind.

Sincerely,



700 10 3 24 1000
L. R. Williams

Executive Director

OP/BSO/ [redacted] jas (3 Jan 68)

Rewritten: O/ExDir/ [redacted] blp (9 Jan 68)

(Letter as originally prepared concurred in by D/Pers on 3 Jan, by

DD/S on 8 Jan, and by Director, OMS on 9 Jan)

Distribution: O & 1 - Addressee

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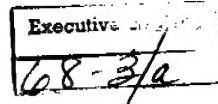
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10/5 68-0023



Mr. Nicholas J. Oganovic, Executive Director
United States Civil Service Commission
Washington, D. C. 20415

Dear Nick:

We have studied carefully the advance copy of the Federal Personnel Manual letter on new procedures for the filing of involuntary disability retirement cases which you sent with your letter of 29 December 1967.

We have no objection to these new procedures provided this Agency can be assured that classified information associated with an involuntary disability retirement case can be fully protected by the normal safeguards governing the handling of classified material. We anticipate that it might become necessary to divulge classified information in describing an employee's duties and the basis for our action in submitting an involuntary retirement application. We also foresee the possibility that the identification of other Agency employees, e.g., supervisors, might be classified information. Other aspects of the new procedures may also require submitting classified information.

Consequently, unless classified material can be safeguarded we must express our grave concern regarding the procedures outlined in the proposed Federal Personnel Manual letter.

I have asked Mr. Emmett D. Echols, our Director of Personnel, to discuss this in greater detail with you.

We very much appreciate your consideration in sending this advance copy and your thoughtfulness in keeping our interests in mind.

Sincerely,

Distribution:

O & 1 - Address

1 - ExDir

1 - ER

2 - DDS

1 - D/Pers

1 - C/BSD

L. K. White

Executive Director

/s/ Emmett D. Echols

Originator:

Director of Personnel

Concur:

OP/BSD (3 Jan 68)

Deputy Director for Support



UNITED STATES CIVIL SERVICE COMMISSION
WASHINGTON, D.C. 20415



R:NTH:jan

YOUR REFERENCE

CO/S 67-6656
DEC 29 1967

Mr. L. K. White
Executive Director-
Comptroller
Central Intelligence Agency
2430 E Street, N. W.
Washington, D. C.

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Dear Mr. White:

The Commission will publish a Federal Personnel Manual letter similar to the attached in the near future in order to begin an improved method of processing disability retirements in the Federal service. We hope to issue the FPM Letter and the regulations on the subject in January, 1968.

This letter is to inform you in advance of the publication of the procedures so that, if you care to comment, we can consider your ideas before we go to press. Please let me have any comment you care to make before January 10.

We were pleased with the generally favorable, and sometimes enthusiastic, response to the procedures which we received from various groups and individuals interested in disability retirement, including employee and veterans organizations, Federal medical directors, and congressmen. The approach was revised considerably after we found a subcommittee of the Interagency Advisory Group to be critical and basically opposed to selective placement efforts on a mandatory basis.

We are confident that you will find these procedures enhance the manner in which we meet the objectives of sound personnel management in the Federal service, including greater assurance of due process to the individual employee.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Nick".

Nicholas J. Oganovic
Executive Director

THE MERIT SYSTEM—A GOOD INVESTMENT IN GOOD GOVERNMENT

PUBLISHED IN ADVANCE OF INCORPORATION
IN FPM Ch. 831 & Supp. 831-1
RETAIN UNTIL SUPERSEDED.

FPM LTR. 831-

UNITED STATES CIVIL SERVICE COMMISSION

FEDERAL PERSONNEL MANUAL SYSTEM

LETTER

Washington, D.C. 20415

FPM LETTER NO. 831-

SUBJECT: Civil Service Retirement: New Filed-by-Agency Disability Retirement Procedures.

Heads of Departments and Independent Establishments:

I. BACKGROUND

The Civil Service Commission has developed improved disability retirement procedures in cases where the agency initiates the application for disability retirement (i.e., "filed-by-agency" cases). These procedures were fully discussed with various interested groups representing both Federal and non-Federal organizations, who offered many constructive comments. The objective of the procedures is to establish safeguards that provide the employee with maximum assurance of fair treatment and a just decision.

The new procedures emphasize "due process", i.e., the right of the employee to be informed, to be heard, and to be represented at all stages of the proceedings--in the employing agency, in the adjudication process, and in the appeals process.

It should be noted that this letter does not change the basic requirements for eligibility to retire on disability as they appear in FPM Supplement 831-1, namely,

1. The employee must have completed at least five years of civilian service.
2. He must, while employed subject to the act, have become totally disabled for useful and efficient service in his position or any other position of the same grade or class.
3. The disease or injury which caused the disability must not be the result of vicious habits, intemperance, or willful misconduct on his part within the 5-year period immediately prior to becoming disabled.
4. The application for disability retirement, when made by the agency, must be filed with the Civil Service Commission before the employee is separated from the service.

INQUIRIES:

This letter does not change basic requirements to comply with applicable laws, Executive orders, and regulations intended to protect information involving the national security.

FPM LTR. 831- (2)

II. PROCEDURAL RESPONSIBILITIES OF AGENCY WHEN IT CONSIDERS FILING FOR AN EMPLOYEE'S RETIREMENT ON DISABILITY

These procedures fall into two categories: those that are required and those that are recommended as good personnel practices. The required procedures must be observed in every case. The Civil Service Commission will remand to agencies without action any case which indicates lack of conformance with required procedures. Failure of an agency to follow recommended procedures will not be cause for remanding or, in itself, a basis for denial of the application.

A. MAKING PRELIMINARY DECISION

Requirement The agency makes a preliminary determination that the employee meets the eligibility requirements for disability retirement on the basis of management evidence, i.e., supervisory observation of job performance, absence from duty, knowledge of illness, accident, or hospitalization.

Recommendation Supervisors and personnel officials should consult informally with the agency medical officer to explore possible medical solutions to the employee's problems.

B. ESTABLISHING A PRIMA FACIE CASE

Requirement The agency then establishes a prima facie case in record evidence that the employee's service (performance, attendance, etc.) is not useful and efficient and that the probable cause is a mental or physical illness apparently not of a transient nature.

C. CONDUCTING A COUNSELING SESSION

Requirement The agency has a counseling session with the employee to discuss the problem and to inform the employee thoroughly of the advantages and disadvantages of the various alternatives open to him, before any formal action is initiated. A transcript need not be made of this session. If it is not feasible to hold a counseling session the reason must be set forth in the record.

Recommendation One of the primary purposes of the counseling session is to explore with the employee the possibility of reassignment to another position in lieu of disability retirement. An agency should make a conscientious search and should consider the employee's potential value for retraining for a different type of work. The agency should not overlook the possibilities of transfer of the employee to a position in another agency. An employee's failure to choose reassignment at this time should not be considered final. Offers should be held open, if possible, and any other opportunities that arise thereafter should be explored up until separation.

FPM LTR. 831- (3)

D. OBTAINING MEDICAL EVIDENCE

Requirement If the counseling session has not made an alternative course of action possible, the agency directs the employee to report for a fitness-for-duty examination, unless evidence is already available to establish that deficiencies in the employee's service are caused by disease or injury. Instruction governing fitness-for-duty examinations appear in FPM Chapter 751.

1. The order to report for examination must be in writing, and must inform employee of the reasons for the examination.
2. If the behavior of the employee has been such as to raise the possibility that the illness is mental or emotional, the agency requests the employee to designate a representative and assists him by naming the kinds of individuals who make good representatives (such as a family member, union officer, veteran's service officer, or attorney). If the employee fails to select a representative, the agency does so. The designated representative should be given copies of all notices issued to the employee. NOTE: Even if there is no question of mental or emotional illness, an employee still has the right to name a representative.
3. If a psychiatric or psychological examination is going to be given, the order to report should clearly state so.

Recommendation If the agency selects a representative it may choose a family member, union officer, veteran's service officer, attorney, or if no other representative is available, an employee of the agency. An employee should be chosen as representative only as a last resort and he should not be an employee under the jurisdiction of the supervisor initiating the request for disability retirement. NOTE: Hereafter in this letter, the word "employee" includes the concept of representative where appropriate, and all rights, notices, etc., are available to representatives.

E. DUTY STATUS

Requirement An agency shall retain an employee in an active-duty status until the final Commission decision on an agency application for disability retirement, except that the agency on the basis of medical evidence may place an employee on leave with his consent, or without his consent when the circumstances are such that his retention in an active-duty status may result in damage to Government property, or may be detrimental to the interests of the Government, or injurious to the employee, his fellow workers, or the general public. If the leave account of the employee is or becomes exhausted, any suspension or involuntary leave without pay shall be effected in accordance with applicable laws, Executive orders, and regulations.

FPM LTR. 831- (4)

F. MAKING TENTATIVE DETERMINATION

Requirement If the agency decides that deficiencies in the employee's service are established and are caused by disease or injury, it then must notify the employee of this tentative determination. The notice must:

1. be in writing
2. give reasons for tentative determination*
3. include explanation of the employee's right to reply orally, or in writing, or both, within a specific reasonable time, but not less than 10 calendar days, instructions for submitting his reply, and of this right to representation, if a representative has not already been designated.
4. advise him of his right (or that of his physician and/or representative) to review the case file and to obtain copies of the objective medical findings at no expense to him, and
5. name the official designated to receive employee's oral reply.

NOTE: The tentative determination may be made on lay evidence in a mental case, if the employee refuses to report for examination or the agency may proceed to remove the employee on charges of refusing to report as directed in a case of a clearly physical nature. Documentation must be complete and adequate.

G. ANSWERING TENTATIVE DETERMINATION

Requirement If employee answers the agency notice of tentative determination, all documentary evidence (i.e., medical reports, hospital records, affidavits or statements, etc.) Offered by the employee or his representative must be received, considered, and included in the case file. An oral reply to the previously designated agency official must be summarized in writing and a copy, approved or supplemented by the employee, included in the case file. The employee may amend the summary or submit correction or supplementation within 5 calendar days. The designated agency official may make or recommend the decision on whether to file an application for the employee's retirement on disability, subject to the provisions of paragraph H, following.

*Where a prudent physician would hesitate to fully inform the employee of the details of his physical or mental condition, details of the medical evidence will not be given to the employee, but must be given only to a licensed physician designated in writing for that purpose by the individual or his designated representative. Special consideration may have to be given to informing a representative who is a family member.

FPM LTR. 831- (5)

H. EXPLORING ALTERNATIVES, MAKING FINAL DECISION AND ACTING ON DECISION

Requirement 1. No employee will be retired on disability when the application is filed by the agency without a certification that there is no suitable position vacant for which the employee is qualified and willing to accept in lieu of retirement. This certification will be made on SF 2801-A, "Superior Officer's Statement".

2. The agency makes its final decision as to whether the deficiencies in the employee's service are caused by disease or injury not due to vicious habits, intemperance, or willful misconduct within the preceding five years and gives notice to the employee which must:

- a. be in writing
- b. contain a statement of findings and conclusions
- c. inform the employee of the agency's decision (i.e., no action, reassignment, or that the agency has filed application for his disability retirement).

3. If it is decided that the employee should be retired, the agency will file an application for his disability retirement with the Civil Service Commission and transmit the entire file.

III. ADJUDICATION BY CIVIL SERVICE COMMISSION UPON RECEIPT OF AGENCY-FILED APPLICATION FOR DISABILITY RETIREMENT

A. REVIEWING FILE - The Commission may return the entire case file to the agency if the required procedures were not observed. The employee will be notified if the case is returned for this reason. If the case file is deemed to conform to procedures required by the Commission, it notifies the employee of

1. Receipt of the application
2. The employee's right to be examined without cost to him (and of his right to participate in selection of the examiner).
3. His right to submit evidence, medical or lay as to medical condition or job performance.
4. The necessity of any examination to obtain further evidence. If the employee refuses to report for an examination, the case may be returned to the agency for such action as the circumstance warrants.

FPM LTR. 831- (6)

B. NOTIFICATION OF COMMISSION DECISION - When all evidence is in, the Commission's Bureau of Retirement and Insurance makes its decision and notifies the agency and the employee. The party adversely affected may appeal within 30 days and may request a hearing. The notice of decision will fully state rules and guidelines for appeal to the Commission's Board of Appeals and Review and how an agency or an employee may request a hearing.

C. APPEALS - If an employee or agency appeals from the decision of the Bureau of Retirement and Insurance, any further medical or other evidence must be submitted in writing to the Board of Appeals and Review.

1. If a hearing is not requested, the Board makes its decision upon the record referred to it and any additional evidence submitted.
2. If a hearing is requested, it will be conducted as follows:
 - a. Commission procedures -
 - 1) The Board of Appeals and Review appoints a hearing officer who develops and controls the record of the hearing.
 - 2) The hearing officer may call Government employees at the request of either party as witnesses.
 - 3) Witnesses will be examined under oath and are subject to cross-examination.
 - 4) The hearing officer will control the admission of evidence to the record, guided by considerations of whether evidence offered is relevant and material.
 - 5) The hearing will not be open to the press or public.
 - 6) The employee will have the right to a representative of his choice. The representative may appear at the hearing with or without the employee.
 - 7) The hearing will be recorded and a verbatim transcript becomes part of the case record, with a copy to each party. Either party may comment on the transcript or matters of record by submitting comments within 15 days after receipt of the transcript.
 - 8) At the conclusion of the hearing, the hearing officer will forward the hearing record to the Board of Appeals and Review with findings as to the non-medical issues of fact, but without recommendations, and a complete copy will be given to the applicant.

FPM LTR. 831- (7)

b. Agency procedures -

1) The agency will make available to the hearing officer any Government employees who are required as witnesses at the hearing either by the agency or the employee and will pay any necessary travel costs and per diem of such witnesses. If the agency does not present a requested witness, it must document reason. The expenses of witnesses who are not Government employees will be paid by the requesting party.

2) Government employees are in a duty status during the time they are made available as witnesses.

3) The agency must assure any of its employees called as witnesses that they will not be subject to restraint, interference, coercion, discrimination, or reprisal in connection with their testimony.

D. FINAL DECISION - The Board of Appeals and Review makes its decision on the appeal after thorough review of the entire file. Independent medical review of the information in the case file will be obtained in all cases from a medical officer serving on an ad hoc basis with the Board. The Board determination will be final and exhaust the employee's administrative rights.

NOTE: The foregoing outline is designed to cover the filed-by-department situation. Employees initiating their own applications for disability retirement would be granted the same rights to appeal to the BAR upon a disallowance of their applications by the BRI. Similarly, an agency has the same appeal rights to the BAR upon a BRI disallowance of an agency-filed claim.

AMENDMENTS TO PART 831 REQUIRED TO
IMPLEMENT REVISED PROCEDURES FOR AGENCIES TO FOLLOW IN FILING
APPLICATIONS FOR DISABILITY RETIREMENT OF THEIR EMPLOYEES

1. §831.106(a)(4). Amend the language that appears after subdivision

(ii). As amended, the subparagraph will read as follows:

(4) When an individual contests the Commission's approval of the application of a department or agency for his retirement on a disability that is:

(i) physical in nature, as distinguished from mental;

and

(ii) of a type concerning which the individual could be fully informed without the probability that the knowledge may affect him adversely,

he is entitled to review the case file, or have it reviewed by his physician or representative, and to a full report of the medical evidence in his file.

2. §831.106(a)(5). Amend the language after subdivision (ii). The subparagraph as amended will read as follows:

(5) When an individual's case involves a disability that is:

(i) a mental condition; or

(ii) another condition of such a nature that a prudent physician would hesitate to inform an individual suffering from the condition of its exact nature and probable outcome,

the Commission will make available only to a licensed physician, designated in writing for that purpose by the individual or his representative, a full report of the medical evidence in his file including a copy of the resumé of the reported behavior irregularities or manifestations of unsatisfactory

service which is ordinarily furnished as background factual evidence to Government mental facilities, psychiatrists, or other physicians who conduct the official retirement medical examination.

3. §831.107 Appeals.

(a) Change the period at the end of the paragraph to a comma and add "or as provided in §831.1205 in the case of an appeal from a final action or order of the Bureau of Retirement and Insurance that involves an application for disability retirement filed by an employee or by an agency."

(c)(2) Revoke.

4. Revoke Section 831.1103 and transfer the language to a new section 831.108.

§831.108 Computation of time. In computing a period of time prescribed by this part, the day of the action or event after which the designated period of time begins to run is not included. The last day of the period is included unless it is a Saturday, a Sunday, or a legal holiday; in this event, the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday.

5. Add new Subpart L as follows:

SUBPART L. DISABILITY RETIREMENT ON APPLICATION OF AN
AGENCY AND DISABILITY RETIREMENT APPEALS.

Authority: The provisions of this Subpart L issued under
5 U.S.C. 8347(a).

831.1201. Scope. This subpart prescribes the procedures to be followed
by:

- (a) an agency in filing an application for the disability retirement
of an employee, and
- (b) the Commission in approving or disapproving an application for
the disability retirement of an employee filed by an employee or an agency.

831.1202. General provisions.

(a) An employee may designate a representative to advise and assist
him with respect to matters arising under this subpart. When an employee
has not designated a representative and the agency considers the interests
of the employee so require, the agency may designate a representative to
receive notices, determinations, decisions, or other written communications
under this subpart. A notice, determination, decision, or document that is
required to be served on an employee by this subpart shall also be served on
the representative, and, if service on an employee cannot be obtained, ser-
vice on the representative constitutes service on the employee. Service
may be made personally or by mail.

(b) Reasons and findings that are required by this subpart to be given
to an employee shall be specific and detailed except when the reasons or
findings relate to details of a physical or mental condition about which a
prudent physician would hesitate to inform the employee. In such a case
only general reasons and findings are given to the employee and he is informed
that, as provided in 831.106(a)(5), a full report of the medical evidence

in his file will be made to a licensed physician whom he or his representative designates in writing for that purpose.

(c) When an agency initiates action that may result in the agency filing an application for the disability retirement of an employee, the agency shall establish an employee retirement file separate from the Official Personnel Folder. The agency shall file in the employee retirement file all documents pertinent to the application, including any notice to submit for fitness-for-duty examination, medical reports, notice of determination that filing of an application for disability retirement appears to be justified, the employee's answer together with any documentary evidence or affidavits he submits with his answer, the written summary of any oral answer together with any amendment or supplement of the summary, and the decision of the agency as to whether or not it will file an application for disability retirement.

(d) These regulations do not change basic requirements to comply with applicable laws, Executive orders, and regulations intended to protect information involving the national security.

believe an employee may be totally disabled within the meaning of paragraph (c)(1) of this section, when satisfactory evidence is not otherwise available, the agency may direct the employee to submit to a fitness-for-duty examination. The employee is entitled to an advance written notice of the examination. The notice shall set forth the reasons for the examination and the general scope and character of the examination. Refusal to submit to a fitness-for-duty examination is a ground for removal from the service or other disciplinary action against an employee. However, when the refusal to submit to the examination appears to be the result of a mental,

emotional, or nervous condition, the agency shall make a finding to this effect and continue to process the application on the basis of other available evidence.

(b) Notice of determination and answer. When an agency determines that filing of an application for the disability retirement of an employee appears to be justified, it shall notify him in writing of:

- (1) its determination;
- (2) the reasons for this determination;
- (3) his right, or the right of his physician or representative to review the case file; and
- (4) his right to answer orally or in writing or both, and to submit affidavits or documentary evidence or both, within a reasonable time to an official designated to receive the answer.

The reasonable time required depends on the facts and circumstances in each case but may not be less than ten calendar days. The official designated to receive the answer shall have authority either to make the decision or to recommend the decision. The official to whom an oral answer is given shall summarize the answer in writing and give the employee a copy of the summary. The employee has five calendar days from the day he received the summary within which to amend and supplement the summary.

(c) Disability standards. An agency shall file an application for the disability retirement of an employee only when it determines that:

- (1) the employee is totally disabled for useful and efficient service in the grade or class of position occupied (as shown

by his performance or by a job-related factor) because of disease or injury not due to vicious habits, intemperance, or willful misconduct on his part within five years before becoming so disabled; and

- (2) there is no suitable position vacant for which the employee is qualified and which he is willing to accept instead of retirement.

(d) Decision. The employee is entitled to a written decision at the earliest practicable date. The decision shall include a statement of findings and conclusions. When the decision is to file an application for disability retirement, the agency shall file the application and retirement file with the regional office of the Commission or the Bureau of Retirement and Insurance, as appropriate.

§831.1204. Notice of receipt of application.

(a) The Commission office that receives the application first reviews it for compliance with the procedures in 831.1203. If there has not been compliance, the Commission office remands the application to the agency for correction of defects and notifies the employee of the remand. If there has been compliance with the required procedures, the Commission office notifies the agency and the employee in writing that it has received the application. The same notice informs the employee that he is entitled to:

- (1) participate in the selection of a medical examiner when the Commission determines under 831.502(a) that a medical examination is necessary;

(2) be examined without cost to him; and

(3) submit further relevant evidence as provided in the notice.

A regional medical officer will forward the file to the Bureau of Retirement and Insurance upon completion of his action.

(b) Decision. After considering the employee's retirement file, the Bureau of Retirement and Insurance either approves or disapproves the application. The Bureau's decision shall be in writing and a copy shall be given to the employee and the agency concerned. The decision shall set forth the Bureau's findings and conclusions and shall inform the employee and the agency of the right of appeal and hearing provided by 831.1205.

§831.1205. Appeal and hearing.

(a) Right of appeal and hearing. An agency or an employee may appeal the decision of the Bureau of Retirement and Insurance to the Board of Appeals and Review, United States Civil Service Commission, Washington, D.C. 20415. The appeal shall be in writing, set forth the reasons for the appeal, request a hearing if the appellant desires a hearing, and be filed with the Board within 30 calendar days after receipt of the decision of the Bureau of Retirement and Insurance. The Board may extend this time limit for good cause shown. A hearing officer designated by the Board shall conduct the hearing when one is requested.

(b) Hearing procedures.

(1) The hearing officer shall fix the time and place of the hearing after giving due consideration to the convenience of the parties.

- (2) A hearing is not open to the public or the press.

Attendance at a hearing is limited to individuals determined by the hearing officer to have a direct connection with the appeal.

- (3) The employee is entitled to appear at the hearing personally or through or accompanied by a representative. The agency is also entitled to participate in the hearing through its representative.

- (4) The hearing officer shall afford the parties opportunity to present documentary evidence and the testimony of witnesses, and to cross-examine witnesses. Each party must arrange for the appearance of its witnesses, except as provided in subparagraph (5) of this paragraph, since the Commission has no subpoena power in these appeals. Testimony is under oath or affirmation. Rules of evidence are not applied strictly, but the hearing officer shall exclude irrelevant, immaterial, or unduly repetitious testimony.

- (5) An agency shall make its employees available as witnesses at the hearing at the request of the hearing officer unless it is administratively impracticable to do so. The agency shall submit to the hearing officer in writing, its reasons for declining to produce a witness. Employees of the agency are in a duty status during the time they are made available as witnesses. Employees of the agency shall be free from restraint, interference, coercion, discrimination, or reprisal in presenting their evidence.

- (6) The hearing shall be recorded by an official reporter designated by the Commission and a verbatim transcript made, one copy of which shall be furnished each party without charge.
- (7) The hearing officer shall make findings as to non-medical issues of fact. The determinations of the hearing officer as to the credibility of witnesses shall be final unless clearly erroneous. He shall include his findings and the hearing transcript in the employee retirement file and forward it to the Board of Appeals and Review.

(c) Powers of hearing officer. The hearing officer may:

- (1) take any action necessary to resolve the issues fairly and to regulate and control the course of the hearing;
- (2) administer oaths and affirmations;
- (3) dispose of procedural requests and similar matters;
- (4) hold all conferences needed for simplification of issues, or for any other purpose;
- (5) exclude any individual from the hearing for contumacious conduct or misbehavior that obstructs the hearing; and
- (6) rule upon offers of proof and receive relevant evidence.

(d) Decision on appeal. After considering the retirement file, including an independent review of the medical information in the file by a medical officer serving on an ad hoc basis with the Board of Appeals and Review, the Board shall affirm or reverse the decision of the Bureau of

Retirement and Insurance. The Board's decision shall be in writing and shall include a statement of the findings and conclusions of the Board. A copy of the decision shall be given to the employee and the agency. The decision of the Board is final and there is no further right of appeal.

831.1206. Review by the Commission. The Commissioners may, in their discretion, when in their judgment such action appears warranted by the circumstances, reopen an appeal and reconsider the Board's decision.

831.1207. Duty status. An agency shall retain an employee in an active duty status until the final Commission decision on an agency application for disability retirement, except that the agency on the basis of medical evidence may place an employee on leave with his consent, or without his consent when the circumstances are such that his retention in an active duty status may result in damage to Government property, or may be detrimental to the interests of the Government, or injurious to the employee, his fellow workers, or the general public. If the leave account of the employee is or becomes exhausted, any suspension or involuntary leave without pay shall be effected in accordance with applicable laws, Executive orders, and regulations.